

## Does Entry Under Void Parol Lease Create Tenancy from Year to Year in New York

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as to indicate an individual liability, but the court by way of dictum clearly indicated its belief that the president by a proper signature, if acting within the scope of his authority, could bind the corporation without any written authorization. ". . . While an executive officer of a corporation is in a sense an agent, he is more than that; he is the alter ego of the corporation. A signing by him is generally considered to be the act of the corporation itself and not the act of an agent. Hence a signing by him, while acting on behalf of the corporation and within the scope of his authority, satisfies the statute requiring a signing by the party to be charged and not authorizing a signing by an agent. Also, although there is authority to the contrary, he is not an agent within the meaning of statutes requiring the authority of an agent to sign to be in writing. . . ." <sup>35</sup> There are faint indications in opposition to this view in two New York lower court decisions; <sup>36</sup> but in those cases the court never had occasion to consider the distinction between executive officers and ordinary agents, and hence their dicta are of little weight.

Since executive corporate officers may well be considered as quasi-principals rather than agents, the majority position seems sound in not requiring such officers to have written authority where they are acting within the scope of their implied powers. The policy of the statutes, to prevent frauds, would appear to be satisfied by demanding written authority in the case of minor agents while permitting major officials to act just as if they themselves were principals. It would be unduly cumbersome to demand that such major officials obtain written authority from the board of directors or stockholders in every instance in which the agency provisions of the Statutes of Frauds are involved.

ANDREW P. DONOVAN.

#### DOES ENTRY UNDER VOID PAROL LEASE CREATE TENANCY FROM YEAR TO YEAR IN NEW YORK

In these postwar days of housing shortages and scarcity of business sites, the legal problems presented by parol leases, which are voidable under the Statute of Frauds,<sup>1</sup> are rarely encountered. The

<sup>35</sup> *Id.* at 15. The court here adopts a quotation from 37 C. J. S. Frauds, Statute of, § 207 (1943), as its own.

<sup>36</sup> *Karnal v. Horovitz*, 187 Misc. 851, 65 N. Y. S. 2d 525 (Sup. Ct. 1946); *Klores v. Empire Title & Guarantee Co.*, 64 N. Y. S. 2d 477 (Sup. Ct. 1946).

<sup>1</sup> N. Y. REAL PROP. LAW § 242. "An estate or interest in real property, other than a lease for a term not exceeding one year, . . . can not be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing. . . ."

quite obvious reason for this circumstance springs from the well known principle of supply and demand. This principle gives to the landowner a measure of power and control,<sup>2</sup> as respects those who are desirous of becoming his tenants, which power formerly rested with the prospective tenants. Thus, we find at the present time, that in most instances where the relationship of landlord and tenant is newly created, a proper and binding lease is formulated in written form. It is, however, to be hoped, that in the not too distant future there will once again, be an adequate supply of homes and commercial properties. Of course, this will place the landlord and tenant on at least a par and may even tilt the scales beyond the balancing point, giving rise to demands by the prospective tenant upon the landlord, in which the latter will no doubt acquiesce as he did prior to this period of shortages. The probable result will be an increase in the number of parol leases and *a fortiori* a prevalence of the problems created by them. With an eye to the future, let us now, in the light of the past, consider one of the main difficulties created by the void parol lease. Let us first observe some basic elements before taking the problem in its entirety.

The Statute of Frauds provides that a parol lease for longer than one year, is void. The statute has been judicially interpreted in New York as meaning voidable or unenforceable rather than void. It follows then, that if the statute is not invoked, the parties being willing, a valid relationship may be established under the parol lease. Once the relationship of landlord and tenant has been established, we find within that relationship tenancies of varying duration and it is with the periods of notice required to terminate these tenancies that we should first concern ourselves. Directing our efforts along these lines we find that the New York Real Property Law fixes the following requirements of notice to bring to an end various tenancies. Within the limits of the city of New York, the *landlord* must give the tenant notice of termination at least thirty days before the expiration of the term and this notice must be given to determine both a tenancy for a month certain and a tenancy from month to month.<sup>3</sup> Outside the city of New York, the notice period for both types of tenancies is one month, and the notice must be given by either *landlord or tenant*.<sup>4</sup>

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<sup>2</sup> This power and control is limited by the presently existing emergency, housing and rent control authorities.

<sup>3</sup> N. Y. REAL PROP. LAW § 232-a. This section is solely for benefit of tenants and does not impose, by implication, a reciprocal obligation on tenants to give 30 days' prior notice to landlord of intention to vacate. *Andriola v. Huber*, 181 Misc. 764, 48 N. Y. S. 2d 617 (Mun. Ct. 1944); *T. I. B. Corporation v. Repetto*, 174 Misc. 501, 20 N. Y. S. 2d 744 (Sup. Ct. 1940), *aff'd without opinion*, 261 App. Div. 813, 25 N. Y. S. 2d 782 (1st Dep't 1941). *Contra*: *Sample v. Fitzsimmons*, 24 N. Y. S. 2d 388 (Sup. Ct. 1940), *no opinion*; *Finck v. Forman*, 24 N. Y. S. 2d 389 (Sup. Ct. 1940), *no opinion*.

<sup>4</sup> N. Y. REAL PROP. LAW § 232-b.

It is to be noted at this point, that no statutory requirements, concerning notice of termination, are set forth in the Real Property Law, with respect to tenancies for a period certain of longer duration than one month. Resorting to case law, we find that when a tenancy for a definite term of years exists, no notice of termination need be given by either party to the relationship, and the tenancy automatically determines at the end of the period certain,<sup>5</sup> either through the passage of time or the occurrence of an event which marks the terminus of the period.<sup>6</sup> The agreement limits the tenancy. To be sure, there may be a provision in the lease which calls for notice and in such case there must be compliance with requirements of the instrument.<sup>7</sup>

To ascertain the period of notice required to be given in a tenancy from year to year, we must again resort to case law, for statutory directions are lacking in New York. Although the parties to the lease may themselves fix both the length of the notice and the time for giving it,<sup>8</sup> in the absence of such stipulations the common law requires a half year notice.<sup>9</sup> Too, such notice must be timely,<sup>10</sup> so that the end of the six months does not extend beyond the end

<sup>5</sup> *Allen v. Jaquish*, 21 Wend. 628 (N. Y. 1839); *Monaghan v. Kane*, 186 Misc. 698, 59 N. Y. S. 2d 892 (Co. Ct. 1946); *Arthur Equities, Inc. v. Horlly*, — Misc. —, 57 N. Y. S. 2d 17 (Sup. Ct. 1945). Some states, by statute, require notice to be given by the landlord. *Hull v. Laugharn*, 3 Cal. App. 2d 310, 39 P. 2d 478 (1934); *Hirzel v. Silker*, 4 W. W. Harr. 588, 156 Atl. 360 (Del. 1930). And by the tenant. *Hirzel v. Silker*, *supra*.

<sup>6</sup> *Miller v. Levi*, 44 N. Y. 489 (1871); *Hunt v. Comstock*, 15 Wend. 665 (N. Y. 1836); *Scheele v. Waldman*, 136 App. Div. 679, 121 N. Y. Supp. 486 (2d Dep't 1910); *Right v. Darby*, 1 T. R. 159, 99 Eng. Rep. 1029 (1786); *Wright v. Cartwright*, 1 Burr. 282, 97 Eng. Rep. 315 (1757); *Hughes and Crowther's Case*, 13 Co. 66, 77 Eng. Rep. 1476 (1616). A lease for a term of years made by one of two partners for the purposes of the business, is subject to the continuance of the business, and the lease determines without notice on the dissolution of the partnership. *Johnson v. Hartshorne*, 52 N. Y. 173 (1873); *Doe v. Miles*, 1 Stark. 181, 171 Eng. Rep. 439 (1816); *Doe v. Bluck*, 8 C. & P. 464, 173 Eng. Rep. 577 (1838).

<sup>7</sup> *M. Fine Realty Co. v. New York*, 53 Misc. 246, 103 N. Y. Supp. 115 (Sup. Ct. 1907); *Carlisle v. Weischoff*, 237 Mass. 183, 129 N. E. 375 (1921); *Brown v. Trumper*, 26 Beav. 11, 53 Eng. Rep. 800 (1858).

<sup>8</sup> *Bridges v. Potts*, 17 C. B. N. S. 314, 144 Eng. Rep. 127 (1864). Tenant may quit on happening of specified event. *Bethell v. Blencowe*, 3 Man. & G. 119, 133 Eng. Rep. 1081 (1841). When notice is fixed by agreement, it must be given in accordance with such agreement and supersedes the common law requirement of six months. *Heyman v. Robertson*, 146 N. Y. Supp. 1075 (1st Dep't 1914), or any statutory provisions. *Northern Pac. Ry. v. Bismarck Commn. Co.*, 41 N. D. 490, 171 N. W. 623 (1919).

<sup>9</sup> *Coudert v. Cohn*, 118 N. Y. 309, 23 N. E. 298 (1890); *Doe v. Lines*, 11 Q. B. 402, 116 Eng. Rep. 527 (1848); *Doe v. Smaridge*, 7 Q. B. 957, 115 Eng. Rep. 748 (1845). *Contra*: *Matter of Steele*, 154 App. Div. 860, 139 N. Y. Supp. 550 (4th Dep't 1913). Some states have not adopted this common law rule and have no governing statutory provisions. In such case the notice must be reasonable. *McNulty v. Windham*, 182 S. C. 462, 189 S. E. 754 (1937); *Robison v. Barton*, 113 S. C. 212, 102 S. E. 16 (1920).

<sup>10</sup> *Boland v. Beebe*, 186 Misc. 616, 62 N. Y. S. 2d 8 (Mun. Ct. 1946).

of the lease year, and it is preferred that the end of the notice period coincide with, rather than end before, the last day of the year reckoned from the commencement of the tenancy, since the notice to quit takes effect as of the last day of the current year,<sup>11</sup> be it the first or a subsequent year of the tenancy.<sup>12</sup>

Although both a tenancy for a year certain, and one from year to year are estates less than freehold, and independently of statute or agreement of the parties, bear different requirements as to notice of termination, there is one further difference between both of the tenancies under consideration, which warrants some thought. This difference lies in the duration of the relationship. A tenancy for a year certain is an estate in land which, as the very name indicates, endures for a fixed and determinable period.<sup>13</sup> It must have a definite beginning and a fixed or determinable end.<sup>14</sup> This tenancy arises by express agreement between the parties. A tenancy from year to year, however, generally arises in one of three different ways: (a) By express agreement between the parties, including a lease for an indefinite term with an annual rental reserved.<sup>15</sup> (b) By a holding over on the part of the tenant at the expiration of a fixed term, with the consent of the landlord.<sup>16</sup> (c) By entry under a parol lease void under the Statute of Frauds, accompanied by payment of rent in accordance with the terms of the void lease in which rent has been

<sup>11</sup> *Coudert v. Cohn*, 118 N. Y. 309, 23 N. E. 298 (1890); *Reeder v. Sayre*, 70 N. Y. 180 (1877); *Kernochan v. Wilkens*, 3 App. Div. 596, 38 N. Y. Supp. 236 (1st Dep't 1896); *Doe v. Grafton*, 18 Q. B. 496, 118 Eng. Rep. 188 (1852); *Humphreys v. Franks*, 18 C. B. 323, 139 Eng. Rep. 1394 (1856); *Doe v. Matthews*, 11 C. B. 675, 138 Eng. Rep. 640 (1851).

<sup>12</sup> *Doe v. Mainby*, 10 Q. B. 473, 116 Eng. Rep. 180 (1847).

<sup>13</sup> "An estate for years is an estate, the duration of which is fixed in units of a year or multiples or divisions thereof. . . ." *Kimberlin v. Hicks*, 150 Kan. 449, 94 P. 2d 335, 337 (1939).

<sup>14</sup> *Western Transp. Co. v. Lansing*, 49 N. Y. 499 (1872); *Kavanaugh v. Cohoes Power, etc., Corp.*, 114 Misc. 590, 187 N. Y. Supp. 216 (Sup. Ct. 1921); *Delk Realty Corp. v. Rubin*, 112 Misc. 178, 182 N. Y. Supp. 786 (Sup. Ct. 1920). In the case of a lease for a period certain, a provision to the effect that the lease shall be determined on the happening of a contingent event which may or may not occur before the expiration of the fixed period, will not prevent the creation of a valid term for years. *Miller v. Levi*, 44 N. Y. 489 (1871); *Wright v. Cartwright*, 1 Burr. 282, 97 Eng. Rep. 315 (1757). Too, a provision in such a lease, for termination at the option of the lessor or lessee, will not prevent a valid term for years. *Tracy v. Albany Exch. Co.*, 7 N. Y. 472 (1852); *House v. Burr*, 24 Barb. 525 (N. Y. 1857); *Hersey v. Giblett*, 18 Beav. 174, 52 Eng. Rep. 69 (1854).

<sup>15</sup> *Pugsley v. Aikin*, 11 N. Y. 494 (1854); *Douglass v. Seiferd*, 18 Misc. 188, 41 N. Y. Supp. 289 (Sup. Ct. 1896); *Kelly v. Varnes*, 52 App. Div. 100, 64 N. Y. Supp. 1040 (4th Dep't 1900). *Contra*: *Hebberd v. Mayo*, 97 N. Y. Supp. 396 (Sup. Ct. 1906).

<sup>16</sup> *Technical Equipment Corp. v. Montauk Garage Corp.*, — Misc. —, 63 N. Y. S. 2d 311 (Sup. Ct. 1946); *Courts v. Golden*, 257 App. Div. 31, 12 N. Y. S. 2d 621 (4th Dep't 1939); *Canfield v. Harris & Co.*, 222 App. Div. 326, 225 N. Y. Supp. 709 (4th Dep't 1927), *aff'd mem.*, 248 N. Y. 541, 162 N. E. 517 (1928).

reserved annually.<sup>17</sup> After the tenancy has been created by any of these methods, the duration is not fixed and definite, as in the period certain. "A tenant from year to year has a lease for a year certain, with a growing interest during every year thereafter, springing out of the original contract and parcel of it."<sup>18</sup> It is not considered as a continuous tenancy, but as recommencing every year.<sup>19</sup> The relationship continues indefinitely, and at the end of any year, it may be brought to an end, by the act of the parties rather than by the terms of the agreement as in the period certain.

Having considered some of the varying ramifications of these tenancies, it is apparent that we must attach considerable importance to ascertaining which of the two tenancies results from an entry into possession, accompanied by payment of rent which has been reserved on an annual basis, under a parol lease which is void because of the Statute of Frauds, for as we have seen, they impose different responsibilities. The requirements of notice are important to both landlord and tenant, giving the one an opportunity to fill a vacancy, and allowing the other time to locate in new quarters after receiving an order to vacate the premises.

In the leading case of *Coudert v. Cohn*,<sup>20</sup> A, the agent of plaintiff's intestate, without the necessary *written* authority as required by the Statute of Frauds,<sup>21</sup> executed a written lease of certain premises owned by his principal, to the defendants. The term was to commence on March 1, 1884, and was to continue for two years and five months, until August, 1886, at an annual rental of \$3,000, payable in equal monthly payments, on the last business day of each month. Defendants entered into possession, occupied the premises and paid rent up to August, 1885. They then left the premises and sought to surrender possession to the plaintiff's predecessor, but the latter declined to accept. Plaintiffs brought this action on the lease. *Held*, plaintiffs were entitled to recover the rent to March 1, 1886. ". . . the doctrine now in this state is such that the defendants on going into possession of the premises and paying rent, became, by reason of the invalidity of the devise, tenants from year to year . . ." <sup>22</sup> In another leading case involving a void parol lease, the court said, "That oral agreement was void, by the statute of frauds, as to the term attempted to be created, or any interest in lands to be derived from it. . . the whole agreement was void, and

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<sup>17</sup> *English v. Marvin*, 128 N. Y. 380, 28 N. E. 634 (1891), *affirming* 55 Hun 45, 8 N. Y. Supp. 283 (N. Y. 1889); *Coudert v. Cohn*, 118 N. Y. 309, 23 N. E. 298 (1890); *Reeder v. Sayre*, 70 N. Y. 180 (1877), *affirming* 6 Hun 562 (N. Y. 1876); *Karsch v. Kalabza*, 144 App. Div. 305, 128 N. Y. Supp. 1027 (2d Dep't 1911).

<sup>18</sup> 35 C. J. Landlord and Tenant § 238 (1924).

<sup>19</sup> *Austin v. Strong*, 47 N. Y. 679 (1872); *Gandy v. Jubber*, 5 B. & S. 78, 122 Eng. Rep. 762 (1864).

<sup>20</sup> 118 N. Y. 309, 311, 23 N. E. 298 (1890).

<sup>21</sup> N. Y. REAL PROP. LAW § 242.

<sup>22</sup> 118 N. Y. 309, 311, 23 N. E. 298 (1890).

might have been legally repudiated, as soon as it was made, by either party to it. But occupation of the lands was taken with the consent of the owner and the rent was paid to him, in pursuance of and under the void agreement. In such case the occupation inures, as a tenancy from year to year."<sup>23</sup>

Thus, we see that when a tenant, under a parol lease void because of the Statute of Frauds, enters into possession and pays rent, which is accepted by the landlord, a tenancy from year to year or month to month arises depending upon the period for which the rent is reserved.<sup>24</sup>

*Seemingly* in conflict with this view, is *Adams v. City of Cohoes*,<sup>25</sup> in which defendant occupied certain premises belonging to the plaintiff under a year to year tenancy, the term commencing on May first of each year. The rent was reserved on a yearly basis, payable semi-annually. The original tenancy had been created as of May 1, 1870, and in March, 1875, the plaintiff gave notice of a raise in rent, to the common council of the defendant. In the following month a resolution was passed by the council, authorizing the mayor to rent the premises at the increased rate, for a period of three years commencing on May 1, 1875. No written lease was executed and the defendant continued in possession, for over 10 years, paying the increased rent semi-annually on the first day of November and May in each year. On August 1, 1885, defendant vacated the premises and tendered the key to plaintiff's agent who refused it. Shortly thereafter the plaintiff was informed of the abandonment. By a recovery in one action and through a judgment by default in another, plaintiff recovered the rent due up to May 1, 1886. This action was brought to recover rent for the period from May 1, 1886, to November 1, 1886. Plaintiff contended that a tenancy from year to year existed, and defendant was required to give notice of termination of such a tenancy; having failed to give such notice, defendant should be held liable for the rent. Defendant on the other hand contended that a tenancy for a definite period was created, which required no notice, and gave the right to vacate at the end of any year. *Held*, when a tenant holds over after a term of years, his tenancy becomes one from year to year,<sup>26</sup> and he has the right to terminate the tenancy at the end of any year without giving the landlord notice of his intention to do so. The phrase year to year was used although in effect a tenancy for a year certain was found. The court

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<sup>23</sup> *Reeder v. Sayre*, 70 N. Y. 180, 183 (1877), *affirming* 6 Hun 562 (N. Y. 1876).

<sup>24</sup> *Unglish v. Marvin*, 128 N. Y. 380, 28 N. E. 634 (1891); *Lounsberry v. Snyder*, 31 N. Y. 514 (1865); *Rosenblum v. Westin*, 93 Misc. 125, 156 N. Y. Supp. 1044 (Sup. Ct. 1916); *Harnett v. Korscherak*, 59 Misc. 457, 110 N. Y. Supp. 986 (Sup. Ct. 1908); *Tress v. Savage*, 4 E. & B. 36, 119 Eng. Rep. 15 (1854).

<sup>25</sup> 127 N. Y. 175, 28 N. E. 25 (1891).

<sup>26</sup> See note 37 *infra*.

also said, that assuming that notice had been necessary, sufficient notice had been given and that it must be "a very dull landlord" who could not derive some degree of knowledge that the tenant intended to terminate the relationship from the facts of abandonment, tender of key and hiring of new premises.

It has been stated that this decision is *dicta*,<sup>27</sup> but the writer fails to see the case in that light. True, there is *dicta* to be found but it is in that part of the holding which states that "Assuming without deciding, that the landlord was entitled to six months or any other period of notice . . . would not the tender . . . the quitting . . . the hiring and actual occupation of other premises . . . answer the purpose and objects of such notice?"<sup>28</sup> It was necessary to the decision of this case to first ascertain whether notice was necessary and if the answer was in the affirmative, it would then devolve upon the court the duty of determining whether such notice had been given. Thus, the court here first decided notice was not required and to bolster the opinion adopted an "even if it were" attitude, concluding that sufficient notice existed to satisfy the requirement had it been present.

If then the holding in this case, respecting notice, is not *dicta*, it is law. But what is the law set forth in this case? Does the case lay down the rule, that in all cases of a year to year tenancy, no notice is required to terminate such a tenancy in New York, or does the case stand for a different proposition? That is the crux of our problem.

*Adams v. City of Cohoes* has often been cited for the proposition that "Where one enters upon and occupies lands with the consent of the owner, under a parol lease for more than one year, and so void under the Statute of Frauds, the occupation inures as a tenancy from year to year; the agreement regulates the relations of the parties, and may be resorted to, to determine their rights and duties in all things consistent with a yearly tenancy. *No notice to quit is necessary in New York in such a case.*"<sup>29</sup> (Italics added.) As a result of this interpretation, much confusion now exists in New York, as respects cases of the type exemplified by *Coudert v. Colm* and *Adams v. City of Cohoes*. Even though confusion exists, it would seem that the conflict can be resolved.

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<sup>27</sup> WALSH, PROPERTY 259 (2d ed. 1937), in footnote 7, states: "In this case, after stating the tenancy is one which may be ended without notice at the end of any year, like the tenancy arising from a holding over, the court pointed out that more than six months had actually been given through the tenant's quitting the premises and tendering them to the landlord on August 1st, hiring and occupying other premises, and refusing to pay rent thereafter, the current year expiring on May 1st, thereafter. Therefore the position taken that no notice was necessary was not required for the decision of the case and was *dicta*." *Contra*: I McADAM, LANDLORD AND TENANT 781-787 (5th ed. 1934).

<sup>28</sup> *Adams v. City of Cohoes*, 127 N. Y. 175, 184, 28 N. E. 25, 27 (1891).

<sup>29</sup> I McADAM, LANDLORD AND TENANT 788 (5th ed. 1934).

*Coudert v. Cohn* and those cases which it represents are pure cases of entry into possession under a parol lease, void because of the Statute of Frauds. In these cases, we find one fact which is common to all, this being an attempt to determine the relationship *before* the terminal date provided for by the agreement. Under such circumstances the rule in the *Coudert* case is applicable and results in a tenancy from year to year, requiring six months' notice to end the tenancy. The *Adams* case *differs* from these cases in that the attempt to determine the tenancy occurred after the terminal date of the void parol agreement. The principle which applies in such a case is that, the provisions of the void parol lease, govern the tenancy in all respects not inconsistent with a yearly tenancy, excepting the duration of the tenancy, and it even applies as respects the duration, to the extent that if the tenancy continues until the end of the term provided for by the parol agreement, the relationship will end without notice as in the case of a valid lease for a definite term.<sup>30</sup> Applying this rule to the facts of *Adams v. City of Cohoes*, we find a parol lease for three years commencing on May 1, 1875, and therefore the tenancy automatically determined three years later. The defendant, however, continued in possession with the consent of the plaintiff-landlord and in so doing, defendant became a holdover tenant. The landlord has the option to treat such a holdover tenant as a trespasser or as a tenant.<sup>31</sup> By accepting the rent through August, 1885, the landlord elected to treat the defendant as a tenant. In the majority of jurisdictions, when there is such a holdover with the consent of the landlord, and no new agreement, a tenancy from year to year results.<sup>32</sup> In New York, however, the later cases hold that in such an instance the law implies a continuance of the lease and the holdover tenancy is for a year certain.<sup>33</sup> In a tenancy for a year

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<sup>30</sup> *Longhran v. Smith*, 75 N. Y. 205 (1878); *Reeder v. Sayre*, 70 N. Y. 180 (1877), *affirming* 6 Hun 562 (N. Y. 1876); *Lounsbury v. Snyder*, 31 N. Y. 514 (1865); *Edwards v. Clemons*, 24 Wend. 480 (N. Y. 1840); *Doe v. Stratton*, 4 Bing. 446, 130 Eng. Rep. 839 (1828).

<sup>31</sup> *Kennedy v. City of New York*, 196 N. Y. 19, 89 N. E. 360 (1909); *Herter v. Mullen*, 159 N. Y. 28, 53 N. E. 700 (1899); *Haynes v. Aldrich*, 133 N. Y. 287, 31 N. E. 94 (1892).

<sup>32</sup> *Jonesboro Trust Co. v. Harbough*, 155 Ark. 416, 244 S. W. 455 (1922); *Hallett v. Barnett*, 51 Colo. 434, 118 Pac. 972 (1911); *City Coal Co. v. Marcus*, 95 Conn. 454, 111 Atl. 857 (1920).

<sup>33</sup> *Matter of Kinum*, 197 App. Div. 839, 189 N. Y. Supp. 536 (3d Dep't 1921); *Souhami v. Brownstone*, 189 App. Div. 1, 177 N. Y. Supp. 726 (2d Dep't 1919). Earlier New York cases generally held a tenancy from year to year. *Conway v. Starkweather*, 1 Denio 113 (N. Y. 1845); *Sherwood v. Phillips*, 13 Wend. 479 (N. Y. 1835).

WALSH, PROPERTY 253 (2d ed. 1937), explains this difference between New York and other jurisdictions as follows: "In New York, however, the courts hold that the tenancy arising from a holding over and acceptance of rent, or a holding over and an election to hold the tenant for the rent on the part of the landlord, as a tenancy for a year certain or a month certain as the case may be. The reasons for this holding are not obvious and are not expressed by the cases so deciding. The rule probably grew out of loose state-

certain, it is not necessary to give notice, since the relationship determines at the end of the period.

It is submitted that the *Adams* case and the *Coudert* case are not in conflict, and that the *Adams* case stands for the proposition that when a tenant *holds over* with the consent of his landlord, after the expiration date provided for by a void parol lease he becomes a tenant for another year and is not entitled to notice of termination at the end of the year. Thus the rule is the same as in a case where the tenant holds over after a valid lease for a period certain. True, the court makes a statement which is not only misleading but probably is legally groundless:<sup>34</sup> ". . . or when the term is for one year by reason of the lease being void under the statute of frauds and occupation for that period, no notice to quit is necessary." This statement indicates that since a parol lease for a year or less is valid, a parol lease for a longer period gives rise to a tenancy for a year certain, permitted by the statute. There is no true legal basis for this reasoning and it seems only to be based on the idea that by entering the relationship the parties intended to create a lease for the longest period permitted by law. This basis is obviously unsound since the intent of the parties must have been to create a tenancy to endure for the time set in the parol agreement. The statement is misleading because it seems to indicate that a tenant who remains in possession *after the first year*, becomes a holdover tenant. This is not the correct rule, since we have already seen that the holdover can only take place at the end of the period originally agreed upon.<sup>35</sup>

In its opinion, the court cited with approval portions of *Reeder v. Sayre*<sup>36</sup> and similar cases falling within the doctrine of the *Coudert* case, and yet it made no attempt to expressly overrule or distinguish these cases. True, it is possible to do so by implication, but on the basis of our prior discussion it seems not to have so overruled.

Since, at the end of each holdover year, there may be a new relationship begun by a further holdover, it would seem to be a relationship that continues indefinitely. On this basis, it is submitted that while the court calls this tenancy one from year to year,<sup>37</sup> as

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ments in some of the earlier opinions that a tenancy for a year or a month arose in such case, the court evidently meaning that the tenancy arising was for at least a year or a month as the case might be since it could not be brought to an end before the end of the current year or month. From these statements, followed in later cases, the rule has become settled, more by accident, perhaps, than by design, that a tenancy for a year or a month certain arises in such case, which ends at the end of each succeeding year or month without notice. Though the New York courts speak of it as a tenancy from year to year or from month to month, it is very evident that it is nothing of the kind, but a tenancy for a fixed period."

<sup>34</sup> 127 N. Y. 175, 182, 28 N. E. 25, 26 (1891).

<sup>35</sup> See note 29 *supra*.

<sup>36</sup> 70 N. Y. 180 (1877).

<sup>37</sup> The court continues to call it a tenancy from year to year instead of year certain, though applying rules which normally attach to the year certain tenancy.

is held in the majority of jurisdictions, it at the same time realizes that the tenancy ends without notice each year, and is renewed by a further holdover.

### Conclusion

Therefore, assuming our observations are correct, we find that if once again there is a prevalence of void parol leases, springing out of the development of adequate housing facilities and commercial buildings, or resulting from some other basis, six months' notice will be required to determine the year to year tenancy arising from entry into possession under the void parol lease. When, however, there is a holdover beyond the time provided for by the lease, the rule in the *Adams* case will be applicable and no notice will be required to terminate. At the present time, it is an open question as to whether or not this is the correct rule. The doubt results from what appears to have been an improper interpretation of the *Adams* case, and it is hoped that in the near future, this question will be resolved by a decision of our Court of Appeals, or an act of the Legislature.

WILLIAM H. CANNON.

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## TORT LIABILITY OF MUNICIPAL CORPORATIONS IN NEW YORK

### I

Until rather recently, this note might very appropriately have been entitled "Tort Immunity . . ." rather than "Tort Liability . . ." for municipal immunity was the general rule and not the exception until 1945. In that year, as a result of *Bernardine v. City of New York*<sup>1</sup> and other cases to be considered, the common law tort immunity of municipal corporations was finally abrogated. This immunity, derived from the state, was extended to a municipality in 1798 in *Russell v. Men of Devon*.<sup>2</sup> At that time the idea of the municipal corporate entity was still in a nebulous state and the action was in effect against the population as a whole. The basis for the decision was lack of precedent, fear of an infinity of actions and the absence of corporate funds out of which satisfaction could be had. Later decisions involved the additional explanations that the municipality derives no profit from the exercise of governmental functions,

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<sup>1</sup> 294 N. Y. 361, 62 N. E. 2d 604 (1945).

<sup>2</sup> 2 T. R. 667, 100 Eng. Rep. 359 (1798).